

July 25, 2011

Ms. Linda McCulloch
Secretary of State
P.O. Box 202801
Helena, MT 59620-2801

Re: Electronic Signatures on Petitions

Dear Secretary McCulloch:

I have reviewed your letter of February 7, 2011, raising the question whether an “electronic signature” satisfies the requirement for an “original signature” on a ballot issue petition sheet pursuant to Mont. Code Ann. § 13-27-301 and the signature gathering requirements contained in Title 13, chapter 10. Since the answer to this question is clear based on the application of statute, I have determined that a letter of advice rather than a formal opinion is the appropriate response.

Montana Code Annotated § 13-27-301 provides that petition sheets must contain “original signatures.” In determining whether an electronic signature satisfies this “original signature” requirement, the first place to look is the plain language of the relevant statutes. Montana Sports Shooting Ass’n v. State, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003. While the Uniform Electronic Transactions Act (UETA) provides that an electronic signature is the equivalent of a traditional signature if agreed to by the parties, the Act “does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.” Mont. Code Ann. §§ 30-18-106, -117(3) (emphasis added). Instead, Mont. Code Ann. § 30-18-117(1) provides that each agency “shall determine whether, and the extent to which, it will send and accept . . . electronic signatures to and from other persons and otherwise create, communicate, store, process, use, and rely upon . . . electronic signatures.” (Emphasis added.)

The Act is clear. Your agency is not required to permit the use of electronic signatures and instead has the discretion to choose whether it will accept electronic signatures and if so to what extent. This may be accomplished by internal policy pursuant to Mont. Code Ann. § 30-18-117(1), or by administrative rule pursuant to Mont. Code Ann. § 30-18-

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118. An electronic signature therefore may satisfy the “original signature” requirement, but only if the Secretary of State decides to accept electronic signatures for this purpose.

The memorandum provided with your letter addresses the Utah Supreme Court decision of Anderson v. Bell, 234 P.3d 1147 (Utah 2010). This case does not alter the above analysis, because agency discretion under Utah’s version of UETA is more limited. In Anderson, the Court determined that Utah’s Act did “not authorize government agencies to make informal decisions on what type of transactions cannot be supported by electronic signatures outside of the rulemaking process” Id. at ¶ 23, 234 P.3d at 1154. Unlike UETA as adopted by Montana, Utah’s Act “requires the state agency to make [the determination of whether it will accept electronic signatures] through the rulemaking procedures” Id. at ¶ 21. Utah’s Act does not include the section of UETA, codified in Montana as Mont. Code Ann. § 30-18-117(1), that allows an agency to determine whether it will accept electronic signatures outside of a formal rule. The Anderson Court therefore determined that Utah’s Lieutenant Governor only has the authority to reject electronic signatures by rule.

As Montana’s UETA does not have this limitation, you are not required to draft a rule before determining what electronic signatures your agency will accept. In fact, the Act requires that you determine whether you will accept electronic signatures regardless of whether you have adopted a rule. See Mont. Code Ann. § 30-18-117(1) (“[e]ach governmental agency shall determine . . .”).

I hope you find this helpful. This letter of advice may not be cited as an official opinion of the Attorney General.

Sincerely,

J. STUART SEGREST
Assistant Attorney General

jss/jym